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No. 03-279

In The

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE,
a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

On Petition Fo A Writ Of Certiorari
To The United S ates Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress acted pursuant to its legislative authority granted under § 5 of the Fourteenth Amendment to the United States Constitution when enacting Title II of the American with Disabilities Act, thereby abrogating States' Eleventh Amendment immunity from individual claims for damages.

2. Whether Congress acted pursuant to its legislative authority granted under § 5 of the Fourteenth Amendment to the United States Constitution when enacting § 504 of the Rehabilitation Act of 1973, thereby abrogating States' Eleventh Amendment immunity from individual claims for damages.

3. Whether the acceptance of federal funds explicitly conditioned upon the waiver of a States' Eleventh Amendment immunity constitutes a knowing and voluntary waiver of sovereign immunity to individual claims for damages.

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STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the case, as set forth in its Petition at 5 to 7.

SUMMARY OF ARGUMENTS

The thrust of Petitioners' Petition for Writ of Certiorari is that review of the Ninth Circuit's decision below is warranted because post-*Garrett*,[1] the circuits are split on whether Congress exceeded its authority for abrogating States' sovereign immunity under Title II of the Americans with Disabilities Act (hereinafter, the "ADA") and § 504 of the Rehabilitation Act. Petitioners' Brief at 10 to 15. Petitioners also argue that the narrower issue of whether an individual claim brought under Title II of the ADA[2] "is purportedly tied to due process concerns rather than equal protection process concerns" (Petitioners' Brief at 9) was not addressed in *Tennessee v. Lane* (02-1667), giving this Court the opportunity "to fully resolve the question whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA." *Id.*

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[1] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001).

[2] *See, e.g., Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003) (Congress validly abrogated State immunity under Title II); *Lane v. Tennessee*, 315 F.3d 682 (6th Cir. 2003), *cert. granted*, 123 S.Ct. 2622 (2003) (Congress could abrogate Eleventh Amendment immunity under Title II of the Americans with Disabilities Act for due process claims); *Wessell v. Glendening*, 306 F.3d 203 (4th Cir. 2002) (States may not be sued for violating Title II); *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13 (1st Cir. 2002) (States may be sued for violations of Title II).

Most importantly to this case, Petitioners argue that review is necessary because the Ninth Circuit "refuses to view *Garrett* as setting out the analysis courts must undertake to resolve questions of Congress's [sic] authority to abrogate States' sovereign immunity." Petitioners' Brief at 14.

Respondent submits that review by this Court is not necessary. This Court has already accepted for review in *Tennessee v. Lane* the broader issue of whether Title II of the ADA exceeds Congress' authority under § 5 of the Fourteenth Amendment, which mirrors the Petitioners' first question presented for review to this Court. Therefore, it is unnecessary for the Court to review the same issue herein.

In addition, review is not necessary in this case, because the Petitioners' justification for review of the narrower issue the Court declined to review in *Tennessee* is based on an issue that was never raised below. That is, the Petitioners argue that the issue of "[w]hether the abrogation analysis under Title II of the [ADA], differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns," which was not addressed in *Tennessee v. Lane*, should be resolved in the case herein. Petitioners' Brief at 9. Petitioners have never addressed the abrogation issue solely in terms of due process or equal protection concerns in the courts below, and this Court's "traditional rule" precludes a grant of certiorari when the question presented was not pressed or passed on below. *United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 255 (1990).

Finally, Respondent submits that review is not necessary, because the Ninth Circuit has consistently adhered – both pre- and post-*Garrett* – to this Court's test first outlined in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), for determining the constitutionality of federal legislation in relation to States' Eleventh Amendment immunity to suits for damages by private individuals. In this case, the Ninth Circuit correctly applied this Court's precedents in holding that the Petitioners herein could be sued for violating Title II of the ADA and for violating § 504 of the Rehabilitation Act. App-15.

REASONS FOR DENYING REVIEW

I. This Court has already granted certiorari in *Tennessee v. Lane* on one of the three questions presented for review by the Petitioners in this case; therefore, review of Petitioners' first question is unnecessary.

As Petitioners have pointed out, this Court has recently granted certiorari in *Tennessee v. Lane* (02-1667) on one of the two questions presented to the Court by the petitioner in that case. Petitioners' Brief at 8-9. In *Tennessee*, this Court accepted for review the broader question of "Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-12165 (2002), exceeds Congress's [sic] authority under § 5 of the Fourteenth Amendment, thereby failing to abrogate the States' Eleventh Amendment immunity from private damage claims." Petitioners' Brief at 9.

Since this case presents the same issue for review, further review is not warranted.

II. The issue of whether the abrogation analysis under Title II is tied to due process concerns rather than equal protection concerns was neither pressed nor passed below; therefore, review is not warranted.

Petitioners argue that since this Court did not grant certiorari on the second, more narrower question presented in *Tennessee v. Lane* – "Whether the abrogation analysis under Title II of the [ADA] differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns" (Petitioners' Brief at 9) – review is warranted in this case to "fully resolve the question of whether Congress properly abrogated States' sovereign immunity for all claims under Title II of the ADA." *Id.*

However, that issue has never been raised by the Petitioners herein, nor has it ever been litigated in this case. It is well established that "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below" (*FW/PBS, Inc.*, *supra*, 493 U.S. 215 at 255). This Court should also pass on reviewing Petitioners' Petition for Writ of Certiorari for that reason, as well.

III. Review of the lower court's decision is not necessary because the Ninth Circuit applied this Court's clearly established principles in holding that the two state correctional institutes could be sued for violations of the Americans with Disabilities Act.

The Ninth Circuit Court of Appeals followed the line of cases decided by this Court in interpreting whether the Eleventh Amendment was a bar to the Respondent's claim

under Title II of the ADA, the application of which is uniform, general and clearly established.

In *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997), *cert. den. sub nom Wilson v. Armstrong*, 524 U.S. 937 (1998), the Ninth Circuit was asked to decide whether the Eleventh Amendment was a bar to plaintiffs' suit for damages against the State of California. The court asked, "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power" in abrogating the States' immunity under Title II of the ADA. *Clark*, 123 F.3d at 1269, *citing Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1123 (1996). In *Garrett*, when faced with the question of "whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990," this Court utilized the same two-part inquiry from its decisions in *Seminole Tribe* and *Kimel v. Florida Bd. of Regents*, 528 U.S. 62; 120 S.Ct. 631 (2000) that the Ninth Circuit had used previously in *Clark*.

The first part of the test – whether Congress unequivocally expressed its intent to abrogate immunity under Title I – was not in dispute in *Garrett*. 531 U.S. at 356.[3] *Garrett*'s holding that the Eleventh Amendment bars suits in federal court by State employees to recover money damages for violations of Title I of the ADA, therefore, was

[3] *Citing* 42 U.S.C. § 12202 which States that "A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."

based on this Court's analysis of whether Congress acted within its constitutional authority in subjecting the States to suits in federal court for money damages under the ADA.

This Court began its analysis in *Garrett* by reiterating that "Congress may subject nonconsenting States to federal-court suit when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment." *Id.*; *see also Kimel*, 528 U.S. at 80; *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1997).

The *Garrett* opinion necessarily focused on the second part of the inquiry of the *Seminole Tribe* test, which requires a court to first identify with some precision the scope of the constitutional right at issue. *Garrett*, *supra*, 531 U.S. at 356, 365.

Once the parameters of the constitutional right in question have been determined by the court, the court must then examine whether Congress identified a history and pattern of such unconstitutional behavior by the States that Congress sought to redress. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627, 670 (1999).

While this Court, in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), reaffirmed Congress' ability to enact federal legislation to carry out the Fourteenth Amendment's objective, and stated that Congress may enact legislation that prohibits more conduct than that which is prohibited by the Fourteenth Amendment itself, the Court has since cautioned that congressional authority has limits. Federal legislation can remedy or deter Fourteenth Amendment violations, but there must be a congruence between the means used and the ends to be achieved.

Garrett, 531 U.S. at 374, citing *City of Boerne*, 521 U.S. at 520.

Since the crux of the inquiry into whether or not Congress has acted pursuant to a constitutional grant of authority in abrogating States' Eleventh Amendment immunity is the appropriateness of remedial measures considered in light of the evil presented *(City of Boerne*, 521 U.S. at 525), the inquiry necessarily is heavily focused upon the legislation, its legislative history, and the findings of Congress. These matters are specific to each piece of legislation so that the examination by a court into one piece of federal legislation cannot therefore predetermine the conclusion from examining a different piece of legislation.[4]

In *Garrett*, for example, this Court examined the record compiled by Congress in support of its conclusion to enact Title I of the ADA. Upon examining the record, the Court found the record virtually devoid of any evidence that the States had historically discriminated against the disabled in employment. The half a dozen examples cited by the respondents failed to suggest a pattern of unconstitutional discrimination. Since the remedy imposed by Congress under Title I of the ADA was not congruent or proportional to the targeted violations, this Court held

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[4] *See, e.g., Nevada Dep't of Human Resources v. Hibbs*, 123 S.Ct. 1972 (2003) (Congress did not exceed its constitutional authority under § 5 of the Fourteenth Amendment when it sought to abrogate States' immunity for violations of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 667 (1999) (Congress exceeded its authority under the Fourteenth Amendment when it enacted the Plant Variety Protection Remedy Clarification Act, 7 U.S.C. § 2321).

that Congress had not properly abrogated the States' Eleventh Amendment immunity from suits. *Garrett*, *supra*, 531 U.S. at 369.

Petitioners erroneously argue that the examination of Title I of the ADA by this Court in *Garrett* predetermines and controls the conclusions of an examination of Title II of the ADA.[5] Petitioners argue that *Garrett* controls the constitutionality of Title II of the ADA as applied to the States, despite the fact that this Court specifically refused to address the issue (*Garrett*, 531 U.S. at 360, n. 1), and despite the fact that the majority in *Garrett* noted that the overwhelming majority of accounts in Appendix C (attached to the opinion) "pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA." *Id.* at 372, n. 7.

The issue in *Garrett* was whether Congress validly abrogated the States' Eleventh Amendment immunity when enacting a question not before the Court in this case. Pursuant to guidance from this Court, the holding in *Garrett* does not affect the question of whether Title II of the ADA was enacted pursuant to a constitutional exercise of power that validly abrogates the States' Eleventh Amendment immunity. *Id.* at 360, n. 1 ("We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under § 5 of the Fourteenth Amendment . . .").

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[5] *But see* Note 4, *supra*.

Although this Court specifically warned that its opinion had no effect on deciding the constitutionality of Title II of the ADA, and thus whether a State is immune from damages for a claim brought under this federal legislation – and specifically, although Petitioners recognize that this Court has rejected Eleventh Amendment immunity claims in Title II and § 504 cases – Petitioners nevertheless argue that the holding in *Garrett* controls the outcome of the issues presented before this Court. Petitioners' Brief at 8.

What Petitioners have failed to address is the fact that Title II of the ADA differs dramatically from Title I. At the outset of the *Garrett* opinion, this Court specifically refrained from passing judgment on Title II as that title "has somewhat different remedial provisions from Title I." *Garrett*, 531 U.S. at 360, n. 1. This Court also contrasted the lack of documented history of discrimination in employment by the States with the Congressional record detailing discrimination by the States in providing public services. *Id.* at 372, n. 7. In the text of the statute itself, Congress made express findings of persistent discrimination in "education . . . institutionalization . . . voting, and access to public services" 42 U.S.C. § 12101(a)(3). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continues to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress reached this conclusion after holding 13 hearings devoted solely to the consideration of the ADA. A special task force was created that held hearings in every State, which were attended by more than 30,000 individuals, informing the congressional delegation of first hand accounts of discrimination.

Garrett, 531 U.S. at 377-378 (Breyer, J., dissenting). The findings amassed through the congressional hearings and individual State task force hearings led Congress to conclude that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically and educationally." 42 U.S.C. § 12101(a)(6). Thus, the Committee Reports that this Court found lacking for purposes of Title I were ample evidence of government discrimination with regard to **public services**. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990).

Garrett reaffirmed this Court's earlier treatment and analysis of federal legislation in relation to States' Eleventh Amendment immunity. Federal legislation enacted pursuant to § 5 of the Fourteenth Amendment may abrogate States' Eleventh Amendment immunity if it exhibits a "congruence and proportionality between the injury to be prevented and remedied and the means adopted to that end." *Id.* at 365, citing *City of Boerne*, 520 U.S. at 520.

The Ninth Circuit has faithfully applied this test to its decisions prior to the ruling in *Garrett* and to the opinions that have been handed down since this Court's February 2001 decision. In 1999, the Ninth Circuit undertook the exact analysis this Court later used in *Garrett*, unequivocally concluding that Title II of the ADA "was a congruent and proportional exercise of Congress' enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity." *Dare v. State of California*, 191 F.3d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001).

Since this Court's holding in *Garrett*, the States of Oregon, Hawaii, and California have all relied on this Court's *Garrett* decision to argue in the Ninth Circuit Court of Appeals that the opinion foreclosed the applicability of Title II of the ADA as it applies to the States and that Congress had exceeded its congressional authority in enacting such legislation against the States. Explicitly pointing to the fact that this Court refused to rule on the ADA in its entirety, that Title II and III differ from Title I, the Ninth Circuit Court of Appeals has repeatedly concluded, after applying the two-part test outlined in *Seminole Tribe*, that Congress validly abrogated States' immunity with respect to Title II of the ADA and acted within its remedial powers under § 5 of the Fourteenth Amendment. *See, e.g.*, *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 962 (2003); *Hason v. Medical Bd. of California*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir. 2002), *cert. dismissed*, ___ U.S. ___, 2003 WL 1792116 (2003). Indeed, as the Ninth Circuit held in the case *infra*, it has already revisited its precedent following this Court's decision in *Garrett*, and, having faithfully applied the Court's two-part inquiry in each case, has "already rejected the State's claims." App-15.

Unlike the record of discrimination in State employment discussed in *Garrett*, there exists an extensive record of unconstitutional State conduct regarding people with disabilities in the areas covered by Title II. Operations of a State affect individuals' voting rights, the right to redress grievances, and the right to humane confinement, among others. These rights are subject to the constitutional limitations of the first ten amendments of the United States Constitution as incorporated and applied to the

States through the Fourteenth Amendment. The Ninth Circuit relied on the extensive record and documented pattern of unconstitutional discrimination in *Dare v. California* and continues to follow well established precedent that Title II meets the necessary congruence and proportionality tests (especially in light of constitutional constraints on State activities by the United States Constitution), and Congress validly abrogated States' Eleventh Amendment immunity under its enforcement powers of § 5 of the Fourteenth Amendment. *Miranda B., supra*, 328 F.3d 1181 (9th Cir. 2003) (parenthetical added).

Because the Ninth Circuit has consistently applied this Court's analysis in determining whether the States are entitled to sovereign immunity for claims brought under Title II of the ADA, review of the lower court decision is unnecessary, since it does not conflict with any decision of this Court.

IV. Likewise, review is not necessary because the Ninth Circuit applied this Court's clearly established principles in holding that the two state correctional institutes could be sued for violations of § 504 of the Rehabilitation Act of 1973.

Although Petitioners are correct in their assessment that the circuits are divided on the question whether Congress properly abrogated States' sovereign immunity for § 504 of the Rehabilitation Act under § 5 of the Fourteenth Amendment (Petitioners' Brief at 10), the majority of circuits, including the Ninth Circuit, are in agreement that Congress properly subjected the States to suits for private damages for violations of § 504 under its Spending Clause authority.

In *Clark v. State of California*, *supra*, 123 F.3d 1267 at 1270, the Ninth Circuit held that § 504 of the Rehabilitation Act of 1973 is a valid exercise of authority under Congress' Fourteenth Amendment legislative power. Since then, the Ninth Circuit has consistently held – and even as recently as this month – that States waive their sovereign immunity under the Eleventh Amendment to claims brought under § 504 of the Rehabilitation Act if they accept federal Rehabilitation Act funds. *See*, *e.g.*, *Pugliese v. Dillenberg*, No. 01-16544 (October 7, 2003).

Petitioners complain that "the Ninth Circuit viewed the waiver in the Rehabilitation Act simply as an exercise of Congress's [sic] spending power." Petitioners' Petition at 20. Petitioners have oversimplified the Ninth Circuit's holdings in this regard. Just as the Ninth Circuit did when examining Title II of the ADA, it examined § 504 under the two-part test outlined in this Court's decision *Seminole Tribe*. *Clark*, *supra*, 123 F.3d at 1269-1270.

The first part of the test is satisfied by 42 U.S.C. § 2000d-7(a)(1), which provides that "a state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of section 504 of the Rehabilitation Act of 1973." *Clark*, *supra*, 123 F.3d 1267 at 1269-1270.

Examining the second part of the *Seminole Tribe* test – whether Congress had acted under a valid exercise of power – the court in *Clark* looked to this Court's precedent set forth in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 244, n. 4 (1985) for guidance. *Id.*

In *Atascadero State Hospital*, *supra*, this Court assumed without deciding that the Rehabilitation Act was enacted under the Fourteenth Amendment, and in dicta

two years later, expressly noted that "[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment." *Welch v. Texas Dep't of Highways & Pub. Trans.*, 483 U.S. 468, 472, n. 2 (1987).

Relying on *Atascadero State Hospital v. Scanlon*, the Ninth Circuit affirmed its ruling in *Clark* and joined four other circuits in holding that a State waives its Eleventh Amendment immunity by accepting federal funds. *Douglas v. California Dep't of Youth Authority*, 271 F.3d 812, 819 (9th Cir. 2001), *rehearing en banc denied*, 285 F.3d 1226 (9th Cir. 2002), *cert. denied*, 2002 LEXIS 4495 (June 17, 2002).[6]

Guided by the Supreme Court's rulings in *Atascadero* and *Seminole Tribe*, the Ninth Circuit Court in *Clark* properly concluded that a State waives its sovereign immunity to suit under § 504 of the Rehabilitation Act, where, after the amendments to the language in the Rehabilitation Act provided for a clear waiver, the State

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[6] *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (by accepting federal Rehabilitation Act funds, States waive their immunity with regard to this section); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) ("the Rehabilitation Act is enforceable in federal court against recipients of the federal largess"); *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), *reversed on other grounds*, *Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 1511 (2000) (describing the Rehabilitation Act's waiver as a "clear" waiver of State sovereign immunity in exchange for federal funds); *See also Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001) ("[A]ny State reading [the Rehabilitation Act's explicit waiver of sovereign immunity] would clearly understand that, by accepting Title IX funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court").

knowingly accepts federal funds under that section. *Clark, supra*, 123 F.3d 1267 at 1271.

According to Petitioners' argument, *College Savings Bank, supra* left open the issue of whether a congressional condition of acceptance of federal funds on a State's waiver of sovereign immunity constitutes a condition on Congress' spending power or as the waiver of the constitutional right which must be knowing, voluntary and unequivocal. Petitioners' Brief at 20.

College Savings Bank, a case decided by this Court two years after the Ninth Circuit's *Clark,* held that the decision to waive immunity must be an "altogether voluntary" one, and, as with any other waiver of a constitutional right, there must be an "intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank, supra*, 527 U.S. at 681-82.

Petitioners argue that "the majority of the circuits have focused solely on this Court's statements [in *College Savings Bank*] regarding the authority of Congress to place conditions on the receipt of federal funds under its spending power." Petitioners' Brief at 28.

In *College Savings Bank,* the Court reviewed the issue of constructive waiver that it had previously expounded on in *Parden v. Terminal Ry. of Alabama State Docks Dep't.,* 377 U.S. 194 (1964). *College Savings Bank, supra*, 144 L. Ed. 2d 605 at 617. In *Parden,* the Court held that even though the Federal Employers' Liability Act (FELA, 45 U.S.C. § 53) did not provide for an express waiver of sovereign immunity as a condition of participation in interstate commerce, a State had constructively waived its sovereign immunity defense by operating a railroad in interstate commerce. *Id.* at 677 (citing *Parden,* 377 U.S. at 192). While the Supreme

Court in *College Savings* overruled the constructive waiver doctrine and refused to recognize waivers implied from participation of a State in a federal program, it also distinguished the situation in *College Savings* from situations where Spending Clause legislation is used to exact a waiver of sovereign immunity. *Id.* at 686. In denying Congress the ability to exact a waiver in FELA, the Supreme Court avowed that Congress could not use its Article I powers to create a constructive waiver of sovereign immunity or sanction States by excluding them from an otherwise permissible activity. *Id.*

In contrast, the Supreme Court in *College Savings Bank* made more explicit what *Seminole Tribe* implies – "that Congress may, in the exercise of its Spending Power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions". *Id.* "Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *Id.*

Therefore, if the States refuse to agree to the condition of sovereign immunity when faced with Spending Clause legislation, they simply lose the benefit of a gift. But in the case of FELA (at issue in *College Savings Bank*), a State that refused gave up its sovereign immunity was faced with a sanction – exclusion from the State in an otherwise permissible activity. *Id.*

Contrary to the argument proposed by the Petitioners, this Court's holding in *College Savings Bank* not only affirmed Congress' authority to place conditions on the receipt of federal funds, but it also affirmed that Congress has the ability to condition waiver of States' Eleventh

Amendment immunity in Spending Clause legislation where express language of the statute clearly informs the States of the implication of accepting federal funds. *Id.* at 676. Moreover, as the Court recognized in *South Dakota v. Dole,* while it is true that federal inducement offered to States can be coercive, States also voluntarily exercise their own choice in accepting the conditions attached to receipt of the federal funds. 483 U.S. 203, 211-12 (1987).

Spending Clause legislation offers gifts to the States that the federal government is under no duty to dispense with. The Spending Clause power allows the federal government to "provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds . . . 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives.'" *South Dakota, supra*, 483 U.S. 203 at 207 (citations omitted). Further, the Spending Clause power is considerable and Congress may carry out "objectives not thought to be within Article I's 'enumerated legislative fields' . . . through the use of spending power and the conditional grant of federal funds." *Id.* at 208 (quoting *United States v. Butler,* 297 U.S. 1, 66 (1936)).

It is undisputed that State sovereign immunity is not absolute. Congress may abrogate such immunity in federal court if it makes its intentions unmistakably clear in the language of the statute and acts pursuant to a valid exercise of power. *Green v. Mansour*, 474 U.S. 64 (1985).

Yet, Petitioners argue that this Court needs to clarify "an important question that divides the federal circuits" on this issue (Petitioners' Brief at 28). Respondent submits

that review is not necessary, because this Court has already articulated a two-part test to determine whether Congress has properly abrogated a State's Eleventh Amendment immunity. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Petitioners do not dispute that § 2000d-7(a) of Title 42 of § 504[7] clearly suffices to meet the first part of the two-part test outlined in *Seminole Tribe*, and that the consensus within the circuit courts of appeals is that this language is effective in putting States on clear notice that application for and acceptance of federal funds is conditioned upon the States' consent to suit in federal court for violations of § 504.[8]

Nonetheless, Petitioners rely on the minority decisions from the Second and Fifth Circuit Courts of Appeals in arguing that this Court should review whether the States could have been said to have "knowingly and voluntarily waived their constitutional right to sovereign immunity." Petitioners' Brief at 28.

In *Alden v. Maine*, 527 U.S. 706, 755 (1999), this Court stated that "the federal government [does not] lack the authority or means to seek the States' voluntary

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[7] "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of 504 of the Rehabilitation Act of 1973."

[8] Even the Second and Fifth Circuits, which have held that Congress did not properly abrogate State sovereign immunity under § 504 for a period of time, have not disputed that § 504 may generally be applied to the States in the future and that the express language of § 2000d-7(a) of Title 42 evidences a clear intent by Congress to abrogate the States' sovereign immunity.

consent to private suits. During the same term that *Alden* was decided, in the *College Savings* case, this Court reaffirmed its holding in *Petty v. Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959), determining that Congress could condition the exercise of its Article I powers on the States' agreement to waive their Eleventh Amendment immunity from suit. *College Savings Bank, supra*, 527 U.S. 666 at 686. This Court even went further and stated that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Id.; see also, Id.* at 678-79, n. 2. Unlike Congress' power under the Commerce Clause, the Court explained that Congress' exercise of power to spend money in the form of a grant is a gift on which Congress could place reasonable conditions that the States were free to accept or reject. *Id.* at 687.

While this Court requires a knowing and voluntary waiver of a State's sovereign immunity, this Court has never required an examination into the subjective intent of the State, as the Second and Fifth Circuits suggest. *See Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001); *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, *rehearing en banc allowed*, 2003 WL 21692677 (5th Cir. 2003). And, contrary to the Petitioners' suggestion that this Court has left open the question of what is a knowing and voluntary waiver of States' sovereign immunity (Petitioners' Brief at 28), this Court has already held that States may waive their immunity either by explicitly specifying their intention to subject themselves to suit or by voluntarily participating in federal spending programs where Congress has expressed a clear intent to condition receipt of federal funds on States' consent to waive their

sovereign immunity. *Atascadero State Hospital, supra*, 473 U.S. 234 at 238, n. 1.

A waiver of Eleventh Amendment immunity as a condition of the receipt of federal funds should be found "only where stated by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Yet, nothing more than a "clear declaration" is needed, for a State to validly waive sovereign immunity upon the receipt of federal funds. *College Savings Bank*, 527 U.S. at 676. As long as the statute's language clearly expresses Congress' intention to exchange the State's waiver of sovereign immunity for the federal largess which § 504 of the Rehabilitation Act clearly does, it is up to the State entity to weigh the costs and benefits of accepting the federal funds. A State weighs the cost to be subject to suit in federal court for those entities, programs or activities receiving federal money under Spending Clause legislation, and "knowingly waives" their sovereign immunity upon receipt of the specified dollars under the statute.

Just last term, this Court noted that the Rehabilitation Act is Spending Clause legislation and expounded on the "contractual nature" of such legislation in *Barnes v. Gorman*, 122 S.Ct. 2097, 2002 U.S. LEXIS 4421, 70 U.S.L.W. 4548 (2002).

In the *Barnes* case, this Court was asked to decide whether punitive damages may be awarded in private suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act of 1973. *Id.* In answering the question, the Court was required to analyze Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) as its provisions detail the

remedies for violations of the provisions of the ADA and Rehabilitation Act at issue. *Id.* at 16. Noting that Title VI, like § 504 of the Rehabilitation Act, are Spending Clause legislation (*Id.*, n. 3), the Court averred that the "contractual nature" of Spending Clause legislation "has implications for our construction of the scope of available remedies." *Id.* at 14, n. 2 (citations omitted). The Court went on:

> "We have repeatedly characterized this statute and other Spending Clause legislation as "much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions". *Pennhurst State Sch. and Hospital v. Halderman,* 451 U.S. 1, 17 (1981) (emphasis added); *see also Davis v. Monroe County Bd. of Ed.,* 526 U.S. 629, 640; *Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 286 (1998); *Guardians Assn. v. Civil Serv. Comm'n of New York City,* 463 U.S. 582, 599 (1983) (opinion of White, J.); *id.* at 632-633 (Marshall, J., dissenting); *Lau v. Nichols,* 414 U.S. 563, 568-69 (1974). Just as a valid contract requires offer and acceptance of its terms, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the [recipient] voluntarily and knowingly accepts the terms of the 'contract' . . . Accordingly, if Congress intends to impose a condition on the grand of federal money, it must do so unambiguously." *Id.* at 9-10.

The analysis of offer and acceptance in contractual matters is purely objective. A State manifests its assent to waive its sovereign immunity under § 504 of the Rehabilitation Act when it applies for and accepts federal funds.

This Court recently strengthened this reasoning in *Lapides v. Board of Regents of the University System of Georgia*, 122 S.Ct. 1640 (2002), when it held that a State's waiver of immunity turns upon its objective conduct (in that instance, removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. *Id.* at 1645-1646. In so holding, this Court specifically declined to adopt an examination of the waiver issue that would turn upon the State's subjective beliefs, casting substantial doubt to the continued validity of the reasoning adopted by the Second and Fifth Circuits in *Garcia* and *Pace*.

This Court explained, "Motives are difficult to evaluate, while jurisdictional rules should be clear." *Lapides*, *supra*, at 122 S.Ct. at 1645-1646. In *Lapides*, removal was a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to the litigation of a State law in federal court; while in the case *infra*, application and receipt of federal funds under § 504 of the Rehabilitation Act was a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's Eleventh Amendment immunity. As Justice Kennedy pointed out in the *Lapides* case, "once the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal. *Id.*

It must logically follow, then, that when a State applies for and receives federal funds conditioned upon the waiver of the State's Eleventh Amendment immunity, the State is clearly aware that its voluntary act will subject it

to the jurisdiction of the federal courts and the notice and action by the State suffices to make it a valid waiver of immunity under this Court's precedence.

Relying on important Supreme Court precedent, the Ninth Circuit concluded in the case *infra* that the Petitioners waived their Eleventh Amendment immunity under § 504 of the Rehabilitation Act by accepting federal funds. *See* App-16.

Atascadero and *College Savings Bank* reaffirm the power of the federal government to condition the receipt of federal funds on a State's waiver of sovereign immunity. As long as the statute's language clearly expresses Congress' intention to exchange the State's waiver of sovereign immunity for the federal largess, it is up to the State entity to weigh the costs and benefits of accepting the federal funds. A State weighs the cost to be subject to suit in federal court for those entities, programs or activities receiving federal money under Spending Clause legislation, and "knowingly waives" their sovereign immunity upon receipt of the specified dollars under the statute.

The Ninth Circuit's opinion in this case, in *Clark* and others, that § 504 is a constitutional exercise of Congress under the Spending Clause is in agreement with the majority of the federal appellate courts that have addressed the issue, and with this Court's rulings.

The holding in the court below is correct and does not conflict with any decision of this Court or raise any significant conflict with a decision of any other courts of appeal. This Court has repeatedly denied petitions for writ of certiorari in recent years which advanced some of the same arguments pressed here by Petitioners regarding the

same statute. *See, e.g., Hawaii v. Vinson*, 123 S.Ct. 962 (2003) (No. 01-1878); *Ohio E.P.A. v. Nihiser*, 269 F.3d 626 (6th Cir. 2001), *cert. denied sub nom Ohio E.P.A. v. Nihiser*, 536 U.S. 922 (2002); *Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 962 (2003). Accordingly, further review is not warranted.

CONCLUSION

For the reasons discussed above, the Respondent respectfully requests that the petition for a writ of certiorari be denied in its entirety.

Respectfully submitted,

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